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Long Yan Fei v Pauls Baya

HIGH COURT (KUALA LUMPUR) — DIVORCE PETITION NO S2-3-366 OF 1998
KAMALANATHAN RATNAM J
25 JANUARY 1999

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Civil Procedure *— Jurisdiction — Divorce proceedings — Respondent raised preliminary objection on grounds that High Court of Malaya has no local jurisdiction to hear petition — Respondent contended that petition should be filed in High Court of Sabah and Sarawak because he is domiciled in Sarawak — Whether High Court of Malaya has jurisdiction to hear petition — Law Reform (Marriage and Divorce) Act 1976 ss 48(1)(c) & 49(1)(b)*

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The petitioner was lawfully married to the respondent at the Bintulu Marriage Registry in Sarawak. The parties had cohabited at an address in Kuala Lumpur. About seven years after their marriage, the respondent moved to Kuching to live and work there, whilst the petitioner continue to reside in Kuala Lumpur. The respondent raised a preliminary objection that the petition should be struck out on the grounds that the High Court of Malaya has no local or territorial jurisdiction to hear the petition. The respondant contended that the petition should be filed in Sarawak and not in West Malaysia because the respondent is domiciled in Sarawak.

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Held, dismissing the preliminary objection:

(1) Section 48 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') clearly states that when parties seek a decree of divorce, both parties to the action must be domiciled in Malaysia. In the present case, it was not disputed that both parties had their domicile in Malaysia when the petition was presented. Therefore, this preliminary objection must be dismissed as s 48(1)(c) of the Act, recognizes the extent of the power of the court to grant a decree of divorce where the domicile of the parties to the marriage at the time when the petition is presented is Malaysia (see p 495E–G).

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(2) By virtue of s 49(1) of the Act, the petitioning wife who has been resident in Kuala Lumpur for a period of two years immediately preceding the commencement of the proceedings, has a right to proceed with this petition. Therefore, this court is not estopped by a plea of lack of jurisdiction to hear this petition just because the respondent has now taken up residence in Kuching (see p 495I–496A).

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[Bahasa Malaysia summary

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Pempetisyen telah berkahwin secara sah dengan penentang di Pejabat Pendaftaran Perkahwinan Bintulu, Sarawak. Kedua pihak telah tinggal bersekududukan di satu alamat di Kuala Lumpur. Lebih

kurang tujuh tahun selepas perkahwinan mereka, penentang telah berpindah ke Kuching untuk tinggal dan berkerja di situ, manakala pempetisyen terus tinggal di Kuala Lumpur. Penentang telah membangkitkan bantahan permulaan bahawa petisyen tersebut haruslah dibatalkan atas sebab Mahkamah Tinggi Malaya tidak mempunyai bidang kuasa tempatan ataupun bidang kuasa wilayah untuk mendengar petisyen tersebut. Penentang telah berhujah bahawa petisyen tersebsut haruslah difailkan di Sarawak dan bukan di Malaysia Barat kerana penentang berdomisil di Sarawak.

Diputuskan, menolak bantahan permulaan:

(1) Seksyen 48 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta tersebut') jelas menyatakan bahawa apabila kedua pihak memohon untuk suatu dekri perceraian, kedua pihak haruslah mempunyai domisilnya di Malaysia. Dalam kes ini kedua pihak tidak mempertikaikan bahawa mereka mempunyai domisil di Malaysia apabila petisyen difailkan. Maka, bantahan permulaan ini haruslah ditolak oleh kerana s 48(1)(c) Akta tersebut mengiktirafkan kuasa mahkamah untuk memberi dekri perceraian di mana domisil kedua pihak perkahwinan adalah di Malaysia sewaktu petisyen tersebut difailkan (lihat ms 495E–G).

(2) Berdasarkan s 49(1) Akta tersebut, pempetisyen yang telah menetap di Kuala Lumpur untuk jangkamasa dua tahun sebaik sahaja sebelum bermulanya prosiding ini, mempunyai hak untuk meneruskan dengan petisyen ini. Justeru itu, mahkamah ini tidak diestopkan oleh hujahan kekurangan bidang kuasa untuk mendengar petisyen kerana penentang sekarang telah menetap di Kuching (lihat ms 495I–496A).]

Notes

For a case on jurisdiction of the High Court to hear divorce proceedings, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) para 2892.

Cases referred to

David Lim Hong Kee, Re; ex p Perwira Habib Bank (M) Bhd (refd)

Legislation referred to

Bankruptcy Act 1967 s 5(1)(d)
Bankruptcy Rules 1969 r 101(2)
Courts of Judicature Act 1964 ss 3, 23, 24
Federal Constitution art 121
Law Reform (Marriage and Divorce) Act 1976 ss 48(1)(c), 2(c), 49(1)(b)

A *Godfrey Thomas Fernandez* (*Azlin, Alahakone & Associates*) for the petitioner.

Shamsul Nur Aqmar bte Shamsul Bahrain (*John Clarke* with her) (*Rusmah Arunan & Associates*) for the respondent.

Cur Adv Vult

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Kamalanathan Ratnam J:

Facts

The petitioning wife, a school teacher, was lawfully married to the
C respondent at the Bintulu Marriage Registry in Sarawak. Both parties had cohabited at an address in Kuala Lumpur ('the matrimonial home'). After unhappy differences had occurred, and about seven years after their marriage, the respondent moved to Kuching to live and to work there, whilst the petitioner continued to reside in Kuala Lumpur. The parties have a daughter, presently five years old. She is now in the custody of the mother,
D pursuant to an order of court, dated 5 November 1997, obtained pursuant to an originating summons filed at the High Court at Kuala Lumpur, whereby she obtained an injunction against the respondent and guardianship, custody, care and control of the child. The petitioner had referred the matter to the marriage tribunal and on each of the five different appointments that were fixed, the respondent had failed to attend.

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The preliminary objection

The respondent, being duly served with the necessary papers, has filed an answer stating that he wishes to raise a preliminary objection relating to the
F jurisdiction of this court to hear the petition. The preliminary objection is that the said petition should be struck out on the grounds that the High Court of Malaya has no local or territorial jurisdiction to hear the petition, and that the local and territorial jurisdiction lies with the High Court of Sabah and Sarawak. In his answer to the petition, the respondent has contended that the reason why this petition should be filed in Sarawak is
G because the respondent is domiciled in Sarawak (East Malaysia) and not in West Malaysia.

Findings of the court

Article 121 of the Federal Constitution merely states that there are two
H High Courts of co-ordinate jurisdiction and status, namely, the High Court of Malaya and the High Court of Borneo, which shall have its registry in Sabah and Sarawak. Incidentally, s 3 of the Courts of Judicature Act 1964 ('the CJA') also gives the same definition to a High Court. The said section also defines local jurisdiction as:

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(a) in the case of the High Court of Malaya, the territory comprised in the States of Malaya, namely, Johore, Kedah, Kelantan, Malacca, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Selangor, Terengganu and the Federal Territory of Kuala Lumpur; and

(b) in the case of the High Court in Sabah and Sarawak, the territory comprised in the States of Sabah, Sarawak and the Federal Territory of Labuan, ... A

It is also pertinent to reproduce s 23 of the CJA which reads:

Civil jurisdiction — general

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(1) Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where —

(a) the cause of action arose; or

(b) the defendant or one of several defendants resides or has his place of business; or

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(c) the facts on which the proceedings are based exist or are alleged to have occurred; or

(d) any land the ownership of which is disputed is situated,

within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court. D

Section 24 of the CJA is also relevant. It reads:

Civil jurisdiction — specific

Without prejudice to the generality of section 23 the civil jurisdiction of the High Court shall include —

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(a) *jurisdiction under any written law relating to divorce and matrimonial causes*; ... . (Emphasis added.)

The respondent referred to my decision in *Re David Lim Hong Kee; ex p Perwira Habib Bank (M) Bhd* [1995] 4 CLJ 627, wherein I had held that since the debtor was a resident in Tawau, the bankruptcy petition ought to have been filed in Tawau and not in Kuala Lumpur. In that case, I had held that there was no evidence before the court as to whether the debtor had carried on business in Tawau or in Kuala Lumpur. All that the petition stated was that the debtor's place of residence was in Tawau. In bankruptcy cases, the bankruptcy rules play a significant role. Rule 101 of the Bankruptcy Rules 1969 reads: F G

Place for filing petition

(1) The petition shall be filed in the Court in which it is to be presented.

(2) Where the debtor has for the greater part of one year immediately preceding the presentation of the petition carried on business in one State and resided in another State the petition may be filed in the Court of the State in which he has carried on business. H

Whilst s 5(1)(d) of the Bankruptcy Act 1967 talks of where the petition is to be presented, r 101 relates to where the petition ought to be filed. It must be noticed, as pointed out by me in *Re David Lim*, that pursuant to the amendment PU (A) 60/1993, the word 'may' as stated in r 101(2) has been substituted with the word 'shall'. But this rule relates to the debtor's place of business. In *Re David Lim*, I went on to hold that because there was I

absolutely no evidence of the place of business of the debtor, r 101(2) did not apply and therefore it was the duty of the petitioner to file the petition in compliance with the CJA. An appeal filed against the decision in *Re David Lim* has since been withdrawn.

The Law Reform (Marriage And Divorce) Act 1976

To my mind, s 24 of the CJA is most relevant. It states that without prejudice to s 23, the High Court in the exercise of its civil jurisdiction, encompasses jurisdiction relating to matters *under any written law relating to divorce and matrimonial cause.* This to my mind, gives the rules sufficient prominence. It is pertinent to refer to s 48 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act'), which reads as follows:

> Extent of power to grant relief
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> (1) Nothing in this Act shall authorise the court to make any decree of divorce except —
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> (a) where the marriage has been registered or deemed to be registered under this Act; or
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> (b) where the marriage between the parties was contracted under a law providing that, or in contemplation of which, marriage is monogamous; and
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> (c) where the domicile of the parties to the marriage at the time when the petition is presented is in Malaysia.

This section clearly states that when parties seek a decree of divorce, both parties to the action must be *domiciled* in Malaysia. It is not in dispute that both parties had their domicile in Malaysia when the petition was presented. Whilst it is clear at the time of filing the petition that the petitioner was resident in Kuala Lumpur and the respondent in Kuching, this does not detract from the fact that both Kuala Lumpur and Kuching are part of Malaysia and that therefore, both parties are domiciled in Malaysia. Therefore, on the basis of s 48(1)(c) of the Act, which recognizes the extent of the power of the court to grant a decree of divorce where the domicile of the parties to the marriage at the time when the petition is presented is Malaysia, this preliminary objection must be dismissed. It is also clear that the Act provides for additional protection for a wife. This is manifested by s 49(1) of the Act which provides that:

> Notwithstanding anything to the contrary in section 48(1)(c), the court shall have jurisdiction to entertain proceedings by a wife under this Part, although the husband is not domiciled or resident in Malaysia if —
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> (a) ...
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> (b) the wife is resident in Malaysia and has been ordinarily resident in Malaysia for a period of two years immediately preceding the commencement of the proceedings.

Therefore, even under s 49(1)(b) of the Act, the petitioning wife who has been resident in Kuala Lumpur for a period of two years immediately preceding the commencement of the proceedings, has a right to proceed

with this petition. It is my judgment therefore, that just because the respondent has now taken up residence in Kuching, this court is not estopped by a plea of lack of jurisdiction to hear this petition. It is pertinent to note that s 48(2)(c) stipulates that where the court is to make a decree of judicial separation, then, and only then, does the question of the residence of both parties in Malaysia, at the time of commencement of proceedings, comes into question. Even then, this is a non issue in this case, since both East and West Malaysia form part of Malaysia. In the circumstances, taking into consideration all matters raised by both parties, I hold that the preliminary objection be dismissed with costs.

Preliminary objection dismissed.

Reported by Jafisah Jaafar